SUPREME COURT, U. S.

MAR 15 1969

JOHN F. DAVIS, CLERK

Supreme Court of the United States

October Term, 1968

No: 1040

NORFOLK MONUMENT COMPANY, INC.,
Petitioner,

v.

WOODLAWN MEMORIAL GARDENS, INCORPORATED, ROSEWOOD MEMORIAL PARK, INCORPORATED, GREENLAWN CEMETERY PARK CORPORATION, ROOSEVELT MEMORIAL PARK AND CEMETERY CORPORATION, PRINCESS ANNE MEMORIAL PARK, INCORPORATED, JAS. H. MATTHEWS & CO. OF VIRGINIA, and JAS. H. MATTHEWS & CO.,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR JAS. H. MATTHEWS & CO. OF VIRGINIA AND JAS. H. MATTHEWS & CO. IN OPPOSITION

WILLIAM H. KING
ROBERT H. PATTERSON, JR.
J. ROBERT BRAME, III
Attorneys for Respondents Jas. H. Matthews & Co. of Virginia and Jas. H. Matthews & Co.

McGUIRE, WOODS & BATTLE
1400 Ross Building
Richmond, Virginia 23219

TABLE OF CONTENTS

	Page
OPINIONS BELOW	1
STATUTES INVOLVED	2
STATEMENT OF CASE	2
CLARIFICATION OF PETITIONER'S STATEMENT OF CASE	4
ARGUMENT	
I. The Cases Cited By Petitioner In Support Of His Petition For Writ Of Certiorari Are Inapplicable To This Case.	9
II. Petitioner Introduced No Evidence Which Raises A Question Of Material Fact Connecting Matthews Of Virginia To The Alleged Conspiracies.	11
III. There Is No Evidence In The Record Which Supports An Inference Of Horizontal Conspiracies Among Respondent Cemeteries.	12
IV. Petitioner Has Failed To Introduce Evidence Or Submit Affidavits Sufficient Under Rule 56(e) To Establish A Vertical Conspiracy Among Matthews And Respondent Cemeteries	15
V. Summary	18
CONCLUSION	19

TABLE OF CITATIONS

Cases

American Tobacco Company v. United States, 328 U.S. 781 (1946) 13

Booth v. Matthews, Civ. A. No. 60-418 (W.D.Pa. 1963) 5, 7, 13, 17

Page

Eastern States Retail Lumber Dealers' Ass'n. v. United States, 234 U.S. 600 (1914) 10

First National Bank of Arizona v. Cities Service Co., ... U.S. ....., 36 L.W. 4394 (1968) 10

Gold Fuel Service, Inc. v. Esso Standard Oil Co., 306 F.2d 61 (3rd Cir. 1962), cert. denied, 371 U.S. 951 (1963) 10, 15

Interstate Circuit v. United States, 306 U.S. 208 (1939) 9, 13, 16

Kaeppler v. Jas. H. Matthews, Civ. A. No. 25618 (E.D.Pa. 1963) 5, 7, 13, 17

Kiefer-Stewart Co. v. Joseph E. Seagram & Sons, 340 U.S. 211 (1951) 9-10

Milgram v. Lowe's Inc., 192 F.2d 579 (3rd Cir. 1951), cert. den. 343 U.S. 929 (1952) 13

Norfolk Monument Co. v. Woodlawn Memorial Gardens, 290 F. Supp. 1 (E.D. Va. 1967), aff'd, 404 F.2d 1008 (4th Cir. 1968) 4, 7, 10, 12, 18

Peller v. International Boxing Club, 135 F.Supp. 942 (N.D.Ill. 1955), aff'd 227 F.2d 593 (7th Cir. 1955) 12

Poller v. Columbia Broadcasting System, 368 U.S. 464 (1962) 9, 10

Theatre Enterprises, Inc. v. Paramount Film Distributing Corp., 346 U.S. 537 (1953) 9

United States v. General Motors, 384 U.S. 127 (1966) 16

United States v. Jas. H. Matthews, 1958 Trade Cas. ¶ 69,187 (W.D.Pa. 1958) 7, 16

United States v. Twentieth Century Fox Film Corp., 137 F. Supp. 78 (S.D. Calif. 1956) 12-13

White Motor Company v. United States, 372 U.S. 253 (1963) 16

Statutes and Rules of Court

Fed. R. Civ. P., 28 U.S.C.:
Rules 26-37 10

Page

Rule 56 18

Rule 56(e) 10, 11

Rule 56(f) 10

Rules of the Supreme Court, Rule 19 10

Texts

American Bar Association, Antitrust Developments: 1955-1968 (1968) 12

Attorney General's National Committee, Report (1955) 12

Chamberlin, The Theory of Monopolistic Competition (6th ed. 1950) 13

Freund and Williams, Modern Business Statistics (1958) 14

Handler, Anti-Trust—New Frontiers and New Perplexities, 2 The Record of the Association of the Bar of the City of New York 59 (1951) 9

Hoel, Introduction to Mathematical Statistics (2nd ed. 1954) 14

Kaysen, Collusion Under the Sherman Act, 65 Q.J. Econ. 263 (1951) 13

Robinson, The Economics of Imperfect Competition (1933) 13

Sorkin, Conscious Parallelism, 2 Antitrust Bulletin 281 (1957) 9

Turner, The Definition of Agreement Under the Sherman Act: Conscious Parallelism and Refusals to Deal, 75 Harv. L. Rev. 655 (1962) 12, 13

Other Authorities

Brief for Appellant, Norfolk Monument Co. v. Woodlawn Memorial Gardens, ... F.2d 4, 6

Petition for Certiorari, Norfolk Monument Co. v. Woodlawn Memorial Gardens, No. 1040 4-8

Supreme Court of the United States

October Term, 1968

No. 1040

NORFOLK MONUMENT COMPANY, INC.,

Petitioner,

v.

WOODLAWN MEMORIAL GARDENS, INCORPORATED, ROSEWOOD MEMORIAL PARK, INCORPORATED, GREENLAWN CEMETERY PARK CORPORATION, ROOSEVELT MEMORIAL PARK AND CEMETERY CORPORATION, PRINCESS ANNE MEMORIAL PARK, INCORPORATED, JAS. H. MATTHEWS & CO. OF VIRGINIA, and JAS. H. MATTHEWS & CO.,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR JAS. H. MATTHEWS & CO. OF VIRGINIA AND JAS. H. MATTHEWS & CO. IN OPPOSITION

OPINIONS BELOW

The memorandum decision of the United States District Court for the Eastern District of Virginia, Norfolk Division, filed October 3, 1967 sustaining the respondents' motions for summary judgment, is reported at 290 F. Supp. 1 and 1968 Trade Cas. ¶ 72,661. This opinion appears at Pet. Cert. 30a and the Court's Order of November 14, 1967 at Pet. Cert. 29a.

The opinion of the United States Court of Appeals for the Fourth Circuit, affirming the District Court, was handed down November 14, 1968 and is reported at 404 F.2d 1008 and 1968 Trade Cas. ¶ 72,648.

STATUTES INVOLVED

Petitioner has cited all applicable statutes and rules (Pet. Cert. 3-4) except Rule 19, Rules of the Supreme Court of the United States:

> 1. A review on writ of certiorari is not a matter of right, but of sound judicial discretion, and will be granted only where there are special and important reasons therefor. The following, while neither controlling nor fully measuring the court's discretion, indicate the character of reasons which will be considered:
>
> (b) Where a court of appeals * * * has decided a federal question in a way in conflict with applicable decisions of this court;

and Rule 56(f), Fed. R. Civ. P., 28 U.S.C.:

> (f) WHEN AFFIDAVITS ARE UNAVAILABLE. Should it appear from the affidavits of a party opposing the motion that he cannot for reasons stated present by affidavit facts essential to justify his opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

STATEMENT OF CASE

On December 16, 1965 Norfolk Monument Company, Inc. ("Norfolk") sued for an injunction and treble damages under both the Sherman and Clayton Acts alleging a conspiracy which injured Norfolk in the retail sales of bronze cemetery monuments. Respondent asked for damages accruing from 1960 (Tr., Vol. II, p. 59, hereinafter Vol. II, p. 59). Woodlawn Memorial Gardens, Inc., Rosewood Memorial Park, Inc., Greenlawn Cemetery Park Corporation, Roosevelt Memorial Park and Cemetery Corporation, and Princess Anne Memorial Park, Inc. ("Woodlawn", "Princess", "Rosewood", "Roosevelt", and "Greenlawn") were named co-defendants. Each of these respondents is a perpetual care cemetery which allows the erection of only bronze markers on concrete bases set flush to the ground. Also named as defendants were Jas. H.

Matthews & Company of Virginia ("Matthews of Virginia"), a maker of rubber stamps for stamping corrugated and paper boxes, and Jas. H. Matthews & Company, a Pennsylvaina corporation ("Matthews"), a manufacturer of bronze memorial plaques.

Petitioner alleged that respondents held meetings and conspired (a) to prevent the sales by petitioner of bronze markers in the respondent cemeteries, (b) to adhere to a policy of selling markers only to cemeteries, (c) to require that the cemeteries install, at exorbitant prices, markers not purchased from them, (d) to make unreasonable installation and perpetual care charges for markers purchased elsewhere, and (e) to advise respondent cemeteries as to the use of the rules and regulations governing their respective operations.

Discovery proceedings began immediately and continued for nine months. Respondents deposed petitioner's officers, and both petitioner and respondents secured full production of all opposing parties' written records relevant to the issues. Petitioner propounded interrogatories which respondents answered in full, but petitioner did not depose any of respondents' officers or employees.

At the end of discovery procedures, petitioner's only substantial complaints were:

> (a) Respondent cemeteries charge from 10 cents per square inch plus $10 to $175 per marker for installation and perpetual care of markers which were not purchased from the cemeteries, whereas the installation and perpetual care charges of the markers sold by the cemeteries were included in the sale prices of the markers; and
>
> (b) Respondent cemeteries refused to permit petitioner and others similarly situated to install markers sold by them on the grounds of respondent cemeteries.

Following Norfolk's admission that it could produce no other evidence of a conspiracy, the District Court granted respondents' motions for summary judgment and entered an order dismissing the suit with prejudice. The Fourth Circuit Court of Appeals affirmed, 2-1.

CLARIFICATION OF PETITIONER'S STATEMENT OF CASE

In order to clarify ambiguities in petitioner's Statement of Case (Pet. Cert. 5-9) respondent has juxtaposed some of petitioner's questionable statements against the text of the record from which they apparently derived.

Petitioner's Statement of Case	Record
"The fees charged by Rosewood Memorial Park, Incorporated and Princess Anne Memorial Park, Incorporated for installing single and double bronze markers are identical * * *." Page 6.	"Princess Anne and Rosewood are owned, operated and controlled by the same stockholders and directors." (Brief for Appellant, p. 5, *Norfolk Monument Co.* v. *Woodlawn Memorial Gardens*, 404 F.2d 1008, 1968 Trade Cas. ¶ 72,648. Also, Vol. III, p. 48)
"Respondents adopt a remarkably uniform practice of charging prohibitive installation fees to permit the use of an outsider's grave marker * * *." Page 5.	In 1966 respondents charged prices ranging from 10 cents per square inch for installation and $10 per marker for perpetual care (Roosevelt) to $175 per marker regardless of size (Woodlawn). (Vol. II, pp. 38-39 and 43-45 and Vol. I, p. 125) For a standard marker (24 x 14), these charges were from $43.60 (Roosevelt) to $175 (Woodlawn); for a double marker (44 x 14) they were $71.60 to $175. Greenlawn, the only cemetery to itemize costs to those who purchased markers from it, charged the same installation and perpetual care fee of all lot owners, regardless of from whom the memorial was purchased. (Answer to Interrogatory 7, at Vol. I, p. 131) The dissenting Judge gave the price spread as $67.20 to $175 (single) and $123.20 to $175 (double) (Pet. Cert. 17a), apparently adopting petitioner's "FACTS," set out on page 6 of its brief before the Fourth Circuit. Respondents can find no record support for the $67.20 and $123.20 amounts for Roosevelt. Moreover, both petitioner's president (Vol. II, pp. 38-

"All of the memorial parks require a specific alloy content in the bronze markers installed, and reserve the right to reject non-conforming markers. The alloy content requirement is the same as markers manufactured by Jas. H. Matthews & Co. * * *." Page 6.

39 and 43-45) and Roosevelt's answer to Interrogatory No. 6 (Vol. I, p. 125) set the price at 10 cents per square inch plus $10 per marker, or $43.60 for a standard (24 x 14) marker and $71.60 for a double (44 x 14) marker.

This same alloy content is used by both Gorham Company, a major competitor (Vol. I, pp. 124-133, 136, 141 and 147-48), and Meierjohan-Wengler, Inc., petitioner's supplier. (Vol. III, pp. 54-55 and 75 and letter from H. Meierjohan, President of Meierjohan-Wengler, Inc. to Norfolk Monument Company, dated December 11, 1963, produced in Gregory's discovery Exhibit (d) # 312 at Vol. II, p. 52)

> Q This analysis contained the same percentages that almost all of these companies adhere to; is that right?
>
> A I don't know about what all of the other companies adhere to, but I know that the company I buy from meets the requirements.
>
> Q Mier, Johan-Wengler (sic), is that the company that you have reference to?
>
> A Yes.
>
> Q Do they conform to the same requirements, the same alloy content?
>
> A Yes, sir, or better.
>
> [Vol. III, pp. 52-53 (deposition of C. C. Gregory, petitioner's president)]

Petitioner earlier cited two consent decrees entered against memorial gardens, *Booth* v. *Jas. H. Matthews*, Civ.A. No. 60-418 (W.D.Pa., 1963) and *Kaeppler* v. *Jas. H. Matthews*, Civ.A. No. 25618 (E.D.Pa., 1963). Both decrees, at § V(B)(1), allow defendant cemeteries to require similar alloy content.

"Matthews, in its pamphlet, 'Modern Cemeteries,' suggests a number of practices, which in effect erect competitive barriers to retailers other than the cemeteries themselves." Page 6.

Below are excerpts from page 11 of the pamphlet "Modern Cemeteries" produced at Vol. I, p. 167 and enclosed in a separate envelope attached thereto:

"Jas. H. Matthews & Co. is not permitted to make recommendations regarding Rules and Regulations concerning quality of memorials or the installation thereof."

* * *

"The question of cost of maintenance of memorials is of great importance to the lot owner and the cemetery. These charges must be realistic in the light of future costs and they can best be determined by consultation with your accountant. Give your accountant a list of the maintenance duties that you perform and have him compute the amount you need to have invested in an Irrevocable Memorial Care Fund Trust to produce sufficient income to defray those expenses. This charge is probably more equitable if applied to the square inch area of the memorial and **the same basis of charge should be assessed against every memorial regardless of who sells the memorial to the lot owner.**" (Emphasis in original)

"[T]he record shows a jury could find that the respondents were mutually aware of the others' restrictive practices." Page 9.

Respondents find nothing in the record indicating mutual knowledge of the parties. Only petitioner's Interrogatory No. 3(g) is even marginally relevant, and all respondents denied joint meetings under oath. (Vol. I, pp. 124, 130, 136, 141, 147, 153 & 155). Petitioner made no attempt to discover, by interrogatories or depositions, whether respondent cemeteries knew of the others' practices or whether they had the opportunity to know. Moreover, respondent cemeteries are scattered throughout the cities of Norfolk, Virginia Beach and Chesapeake. (Brief for Appellant, p. 4, *Norfolk Monument Co.* v. *Woodlawn Memorial Gardens*, 404 F.2d 1008).

"This is at least the fourth time Matthews has been named co-defendant with memorial parks in anti-trust actions attacking the same practices. Each of the previous actions * * * was settled by a consent decree enjoining the specific practices complained of in this case." Pages 6 and 7.

1. *United States* v. *Jas. H. Matthews & Co.*, 1958 Trade Cas. ¶ 69,187 (W.D. Pa. 1958). The consent decree forbids practices herein complained of: "Making any suggestion or recommendation to any cemetery the purpose or effect of which, is, or may be to eliminate or restrict sales, by any person, of bronze markers for installation in such cemetery;" § V(D), *supra*, page 74,641. No memorial parks were named co-defendants.

2. *Booth* v. *Jas. H. Matthews & Co.*, No. 60-418 Civ. (W.D.Pa. 1963). Dismissed as to Matthews, with prejudice. Defendant cemeteries allowed to establish bronze alloy standards and require certificates of compliance. § V(B)(1) Cemeteries were allowed to charge installation and perpetual care fees and to do all installation, so long as standards and charges were uniformly applied. §§ V(A)(2) and (3), (B)(2) and VI.

3. *Kaeppler* v. *Matthews*, No. 25618 Civ. (E.D.Pa. 1963). Disposition and decree identical to *Boothe, supra*.

4. *Norfolk Monument Company* v. *Woodlawn Memorial Gardens*, 290 F.Supp. 1 (E.D.Va. 1968). Summary judgment entered for all defendants.

"There is direct evidence of frequent conferences between the memorial parks and representatives of respondent Matthews." Page 9

"There is evidence of numerous visits to and conferences with the memorial parks by sales representatives of Matthews." Page 6.

Q I gather from your earlier testimony that you have no evidence other than circumstantial concerning any meetings between Matthews and the other defendants?

A That is correct.

[Vol. III, pp. 75-76 (deposition of C. C. Gregory, petitioner's president). See, also, Vol. III, pp. 37, 53-54 and 59-60]

Petitioner's evidence of "numerous visits" apparently came from respondent's answers to Interrogatory 8. Below are representative answers:

> Representatives from all of the bronze manufacturers call on us periodically, including James H. Matthews & Company. [Greenlawn; Vol. I, p. 131]
>
> Someone from Jas. H. Matthews & Co. called on Roosevelt for the purpose of selling bronze grave markers, but the date and name of such individual is not recollected. [Roosevelt; Vol. I, p. 126]
>
> Woodlawn made no purchases from or through Mr. Clouser [Matthews' local representative], and neither solicited nor received any assistance from him. All dealings with James H. Matthews & Co. were handled by correspondence with its main office, in the form of orders. Woodlawn's contacts with Mr. Clouser were rare, and were not on a regular basis. [Woodlawn; Vol. I, p. 137]

See, also, the remaining answers at Vol. I, pp. 142, 148 and 153-157.

I.

The Cases Cited By Petitioner In Support Of His Petition For Writ Of Certiorari Are Inapplicable To This Case.

This case raises the question of whether illegal horizontal and vertical conspiracies can be inferred from (1) a common practice of refusing to allow third parties to install grave markers, (2) widely varying installation prices, (3) an advertising booklet openly circulated but alleged to be the "hub of the conspiracy," and (4) unchallenged affidavits denying all allegations of conspiracy.

For a case in this posture, petitioner's cases are inapplicable. In *Poller* v. *Columbia Broadcasting System,* 368 U.S. 464 (1962), the defendant CBS used its great economic power to acquire for one-half million dollars a local UHF television station which it promptly removed from the air along with several other UHF stations elsewhere. This Court held that a jury could properly infer that CBS's closing down a recently acquired UHF station, apparently against its self-interest, marked an illegal conspiracy to destroy UHF broadcasting. The closing of stations and agreements with co-defendants were proved, and only an improper motive remained to be inferred.

In *Interstate Circuit* v. *United States,* 306 U.S. 208 (1939), the plaintiff introduced an express invitation from a dominant group of film exhibitors to the dominant group of distributors to grant film clearances detrimental to competing exhibitors. Granting such clearances would have been inimical to the self-interest of one film distributor acting alone and could not have been maintained. This Court held that the uniform granting of identical clearances by the invitees allowed the inference of an improper motive. Subsequently, this Court rejected *Interstate Circuit's* loose language relied on by petitioner. *Theatre Enterprises, Inc.* v. *Paramount Film Distributing Corp.,* 346 U.S. 537, 540-41 (1953). See Handler, *Anti-Trust—New Frontiers and New Perplexities,* 2 The Record of the Association of the Bar of the City of New York 59, 66-67 (1951) and Sorkin, *Conscious Parallelism,* 2 Antitrust Bulletin 281 (1957).

In *Kiefer-Stewart Co.* v. *Joseph E. Seagram & Sons,* 340 U.S.

211 (1951), the plaintiff introduced a letter by co-defendant Calvert that it had "to go along with Seagram." Plaintiff further proved that prior to this letter, defendants Seagram and Calvert held joint meetings and subsequent to the letter charged liquor wholesalers "identical terms."

In *Eastern States Retail Lumber Dealers' Ass'n.* v. *United States,* 234 U.S. 600 (1914), the instrument of the conspiracy—systematically circulated trade reports naming wholesalers who sold in competition with association members—was introduced into evidence. Other evidence indicated that these reports encouraged retailer boycotts of named wholesalers—acts which in the absence of a conspiracy would be contrary to the retailer's self-interest.

Although petitioner contended in its complaint that the instruments of a conspiracy existed, it refused to utilize the full opportunity for discovery provided by Rules 26-37 and 56(f), Fed. R. Civ. P., 28 U.S.C., and consequently has been unable to produce witnesses, letters, agreements, correspondence or any other testimonials to a conspiracy among the several defendants. See, *Gold Fuel Service, Inc.* v. *Esso Standard Oil Co.,* 306 F.2d 61, 64 (3rd Cir. 1962), *cert. den.,* 371 U.S. 951 (1963). Nor has petitioner shown, as did the successful plaintiffs in the above cases, that the acts he complains of are inimical to respondents' apparent self-interest.

Petitioner's cases are inapplicable when petitioner has no proof of agreements among respondents. Moreover, both the District Court and the Circuit Court below were aware of the Court's admonition of caution in *Poller,* and the Court of Appeals cited *Poller* in its opinion. *Norfolk Monument Co.* v. *Woodlawn Memorial Gardens,* 404 F.2d 1008, 1011. This Court has recently added that *Poller* should not be read as prohibiting summary judgments in conspiracy cases. *First National Bank of Arizona* v. *Cities Service Co.,* ..... U.S. .....; 36 L.W. 4394 (1968).

Petitioner has failed to show that the Courts below have decided a "federal question in a way in conflict with an applicable decision of this court * * *." Rule 19, Rules of the Supreme Court. Therefore, there are no "special and important reasons" for issuing a writ of certiorari.

II.

Petitioner Introduced No Evidence Which Raises A Question Of Material Fact Connecting Matthews Of Virginia To The Alleged Conspiracies.

Petitioner's complaint alleged that Matthews of Virginia sold bronze cemetery markers and participated in a conspiracy restraining trade therein. In both its answer and the affidavit of T. J. Mier, its President, Matthews of Virginia affirmed that it

> does not now, and has never, engaged in the sale, manufacture or distribution of bronze products (including bronze memorials or bronze grave markers); (ii) it was engaged in the manufacture of dyes, rubber stamps, inks, seals and other products for marking on paper and corrugated boxes; (iii) its operations were entirely separate and unrelated to the bronze operations of the defendant Jas. H. Matthews & Co.; * * * [Vol. I, p. 153; see, also, Vol. I, pp. 83-88 and 237-39]

Petitioner's President, Charlie C. Gregory, was asked the following question on deposition:

> Mr. Gregory, in the bill of complaint you allege that both Matthews of Pennsylvania and Matthews of Virginia, two separate corporations, "are engaged in the manufacture and sale of bronze grave markers." Do you have any evidence at all of any nature that Matthews of Virginia is in fact engaged, or was engaged, in the manufacture and sale of bronze grave markers?
>
> A. No, sir.
>
> [Vol. III, pp. 68-69]

Following that exchange Matthews of Virginia submitted an affidavit specifically denying any part in the alleged conspiracy. (Vol. I, pp. 237-39) Not one of petitioner's several subsequent affidavits made reference to the part played by Matthews of Virginia in the conspiracy. (e.g., Vol. I, pp. 264-281)

Under Rule 56(e), Fed. R. Civ. P., 28 U.S.C., after the facts alleged in the complaint have been specifically denied under oath, the adverse party may not rest upon its pleadings in opposing a motion for summary judgment.

Norfolk has rested upon the allegations of its pleadings and has not set forth "specific facts showing that there is a genuine issue for trial." Under the mandate of Rule 56(e) "if he does not so respond, summary judgment, if appropriate, shall be entered against him." Since there is no genuine issue of material fact indicating that Matthews of Virginia sold or manufactured bronze markers or in any way participated in the alleged conspiracies, the motion for summary judgment should be sustained. *Peller* v. *International Boxing Club,* 135 F.Supp. 942 (N.D. Ill. 1955), *aff'd.* 227 F.2d 593 (7th Cir. 1955) and Craven, J., dissenting in *Norfolk Monument Company, Inc.* v. *Woodlawn Memorial Gardens, et al,* 404 F.2d 1008, 1019.

III.

There Is No Evidence In The Record Which Supports An Inference Of Horizontal Conspiracies Among Respondent Cemeteries

Petitioner alleges that record evidence allows the inference of horizontal conspiracies among respondent cemeteries. Yet, petitioner can only point to parallel prices, the parallel refusal of respondents to allow third parties to install markers and mutual knowledge of these practices.

A. As the former Assistant Attorney General in charge of Antitrust pointed out, absent a showing of contrary self-interest "conscious parallelism is meaningless * * * ." Turner, *The Definition of Agreement Under the Sherman Act: Conscious Parallelism and Refusals to Deal,* 75 Harv. L. Rev. 655, 681 (1962). The Attorney General's National Committee to Study the Antitrust Laws concurred:

> "Conscious parallelism" is not a blanket equivalent of conspiracy. Its probative value in establishing the ultimate fact of conspiracy will vary case by case. Proof of agreement, express or implied, is still indispensable to the establishment of a conspiracy under the antitrust laws.

Report 39 (1955). Accord, ABA, *Antitrust Developments: 1955-1968* 22-24 (1968).

Both courts and economists have agreed with Judge Yankwich:

> The act of each, no matter how independently taken, may have a striking similarity, for the very obvious reason that the measures taken are *the only ones* which commend themselves in the circumstances. [*United States* v. *Twentieth Century-Fox Film Corp.*, 137 F.Supp. 78, 93 (S.D.Calif. 1956)].

For the economists' position, see Chamberlin, *The Theory of Monopolistic Competition* 31 (6th ed. 1950) and Kaysen, *Collusion Under the Sherman Act,* 65 Q.J.Econ. 263 (1951).

Conscious parallelism is legally irrelevant unless supported by either proof of an express agreement or a showing that the parallel acts are contrary to the parties' apparent self-interest. *American Tobacco Co.* v. *United States,* 328 U.S. 781, 803-04 (1946), *Milgram* v. *Loew's Inc.,* 192 F.2d 579, 583 (3rd Cir. 1951), *cert. den.* 343 U.S. 929 (1952), *Interstate Circuit* v. *United States,* 306 U.S. 208, 222-223 (1939) and Turner, *supra,* at 677-678.

B. Petitioner has no evidence of meetings among respondent cemeteries. Nor has he attempted to test their denials by cross-examination. Further, there is no evidence that the respondents knew of the practices of others.

Petitioner contends that respondents' refusal to allow third parties to install markers proves the conspiracy. But there is a very apparent business reason—the need for uniformity in the cemeteries. Even petitioner's president recognizes this need. (Vol. III, p. 43) And the consent decrees petitioner cited allowed cemeteries to reserve the right to standardize and install markers. *Booth* v. *Matthews, supra,* and *Kaeppler* v. *Matthews, supra,* at § V(A)(2) and (B).

Petitioner contends that installation charges are too high, but this does not prove conspiracy. See, generally, Chamberlin, *The Theory of Monopolistic Competition* and Robinson, *The Economics of Imperfect Competition* (1933). Moreover, petitioner asserts that installation costs are only $3.00. Yet petitioner fails to mention the cost of labor. Petitioner's casual attitude toward installation (Vol. III, pp. 46-48) should be contrasted with the care which Greenlawn takes:

1. Oiling and preparing markers for foundation base.

2. Making form and pouring foundation consisting of 5 to 6 in. of concrete, reinforced.
3. Removing form, transporting to and from grave site, excavating foundation and setting pre-poured marker.
4. Returning to marker and raising two to three times, depending on grave settlement. [Vol. I, p. 131]

Respondents must care for the markers in perpetuity. Thus they must charge and invest enough to produce a yearly income sufficient to pay for this extra care which includes:

1. Cleaning memorial periodically, usually every two to three weeks.
2. Trimming around memorial by hand during the growing season every 10 to 15 days. The type of grasses used are of the fast growing variety (Bermuda or Wild grass) specifically (sic) of which would grow completely across a marker in this period of time. [Vol. I, p. 131]

Not all graves have markers, so the price of the site pays only for perpetual care of the grave. It is more difficult to mow a grave with a marker, and a considerable amount of hand trimming is required. Even if this cost only $4.00 more per year, this cost, capitalized at a 4% rate, would dictate a trust fund of $100 per marker.

Petitioner charges that prices ranging from $43.60 to $175 for single markers and $71.60 to $175 for double markers are "remarkably uniform." These prices, respectively, have a mean distribution of 48.5 and 40.5. The average prices are $97 and $140. A standard deviation which ranges from 50 to 35 per cent of the average price indicates an unusually wide price distribution and is in no sense "remarkably uniform."*

* This was computed by treating Rosewood and Princess Anne as one unit and assuming a frequency of 1 for the prices. See, Freund and Williams, *Modern Business Statistics* 84-90 (1958) and Hoel, *Introduction to Mathematical Statistics* Ch. 4 (2d ed. 1954).

Finally, there is no uniformity in the way respondents compute their charges. Roosevelt charges ten cents a square inch installation charge and $10 per marker for perpetual care. Greenlawn charges twelve cents per square inch installation and fourteen cents per square inch perpetual care. Woodlawn charges $175 for installation and perpetual care, regardless of size. Princess Anne and Rosewood have identical charges, but they are jointly owned and operated.

C. The present posture of this case is similar to *Gold Fuel Service, Inc.* v. *Esso Standard Oil Co.*, 195 F. Supp. 85 (D.N.J., 1961), *aff'd.* 306 F.2d 61 (3rd Cir. 1962), *cert. den.* 371 U.S. 951 (1963) and should be similarly treated. The District Court granted sumary judgment in a Section 1 Sherman Act proceeding in which the plaintiff introduced evidence of similar bids for an oil supply contract. The Court of Appeals pointed out that consciously parallel acts do not alone "supply a sufficient basis for submitting the question of preconcert to the jury." 306 F.2d at 64. The Court quoted plaintiff's admission "that it [plaintiff] had no evidence except the fact of low and ultimately identical bidding by several producers to support its claim for conspiracy." In affirming summary judgment, Judge Hastie sumarized:

> [W]e think the plaintiff has given no indication that it could show a basis for a logical inference of preconcert predicated on conscious parallelism. This omission is fatal to the plaintiff's case even before trial, at least where uncontradicted affidavits and other documentary material submitted on motion for summary judgment, if true, provide a conclusive negation of the generally pleaded conspiracy claim, and plaintiff has failed to take advantage of ample opportunity by discovery or otherwise to contradict defendant's showing. [306 F.2d at 64]

IV.

Petitioner Has Failed To Introduce Evidence Or Submit Affidavits Sufficient Under Rule 56(e) To Establish A Vertical Conspiracy Among Matthews And Respondent Cemeteries.

Petitioner asserts that three facts indicate that Matthews is part of the conspiracy. These are Matthews' admission that it mailed an advertising booklet, "Modern Cemeteries," to many cemeteries.

Petitioner asserts that these booklets formed the basis of the horizontal conspiracies among the cemeteries. Petitioner also argues that Matthews encouraged the cemeteries to require that markers be made of the bronze alloy which Matthews uses. Finally, petitioner found "direct evidence" of frequent meetings among respondents.

In light of the record, these charges are absurd. First, Matthews, admits that it distributed the booklet "Modern Cemeteries," but the trial Judge described it as only "a form book." 290 F. Supp. at 3. Nevertheless, petitioner asserts that this booklet is the hub of a conspiracy and the equivalent of a joint invitation to conspire. Cf. *Interstate Circuit* v. *United States,* 306 U.S. 208 (1939). Yet Norfolk apparently considered the booklet so insignificant that it did not print it in its appendix or quote offending provisions in its brief. At several places, this booklet contained the following warning:

> IMPORTANT NOTICE
>
> Under the decrees entered into by Jas. H. Matthews & Co., in the Anti-Trust case brought against it by the United States Government, Matthews is not permitted to recommend or suggest Rules & Regulations for Cemeteries regarding the quality, specifications, costs of installation, and foundation of memorials. [Page 17 of "Modern Cemeteries" produced at Vol. I, p. 167]

Even the most vivid imagination could not convert this into *Interstate Circuit's* joint invitation to conspire. This booklet falls short of the standards of proof of vertical conspiracies which this Court applied in *White Motor Company* v. *United States,* 372 U.S. 253 (1963) and *United States* v. *General Motors,* 384 U.S. 127 (1966). Nor does Matthews have the power to impose its regulations. (Vol. III, p. 77) Matthews distributed "Modern Cemeteries" in 1959, subsequent to the entry of the 1958 anti-trust consent decree, *United States* v. *Jas. H. Matthews,* 1958 Trade Cas. ¶ 69,187 (W.D.Pa. 1958). If the booklet were so ominous as petitioner alleges, this surely would have been called to the attention of the District Court and Matthews long ago would have been charged with criminal contempt.

Second, petitioner complains of the respondent cemeteries' requirement that all markers have a certain alloy content. Since this is the alloy content used by Matth[illegible] petitioner contends that this is proof of a conspiracy. Yet both [illegible]han-Wengler, petitioner's supplier, and Gorham Company, [illegible]awn's chief supplier, use that same alloy. Moreover, in cases cited by petitioner, defendant cemeteries were allowed to require proof that outside markers were made of that alloy. *Booth* v. *Matthews* and *Kaeppler* v. *Matthews, supra*, at § V(B)(1). The proper inference is not that there is a conspiracy, but that the particular alloy required by the respondent cemeteries is best for perpetual care markers.

Third, petitioner implies that there were frequent clandestine meetings between respondent Matthews and the cemeteries. The only evidence of such meetings, however, is found in respondents' answers to petitioner's Interrogatory No. 8. Respondents' answers reflect the obvious: Matthews is a manufacturer and distributor of bronze markers; respondent cemeteries purchase and sell markers. To sell its products, Matthews must solicit sales. To infer a conspiracy from these solicitations is to make every manufacturer and wholesaler completely vulnerable to anti-trust strike suits alleging conspiracy.

The undisputed facts in the record show that there is no uniformity in Matthews' relations with respondent cemeteries. Roosevelt has never purchased a Matthews' marker. (Vol. I, p. 124) Greenlawn, in each year 1961, 1962, 1963 and 1964, purchased more markers from Gorham Company than it purchased from Matthews in the entire period 1960 through 1965. (Vol. I, p. 130) The respondent cemeteries purchased less than 50% of their requirements from Matthews in the period for which damages are asked. (Vol. I, pp. 124-58)

Little additional comment need be made to the strange alchemy which can transmute occasional salesmen's calls, an advertising booklet, and industry-wide use of a common bronze alloy into insidious vertical and horizontal conspiracies violating both the anti-trust laws and consent decrees.

V.

Summary

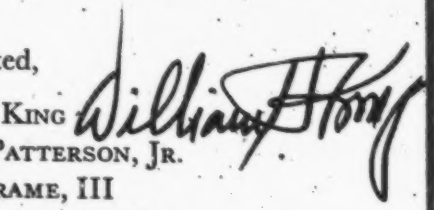
We can offer no more concise summary than that of the District Court:

> The plaintiff knows of no meetings between the parties; the plaintiff argues that the book "Modern Cemeteries,—Recommendations for their Attorneys" prepared and distributed by Jas. H. Matthews & Co. of Pennsylvania in the interest of management and executives of the Modern Cemetery Industry, admittedly containing many suggestions picked up and inculcated into some of the defendant cemeteries' printed matters, is a hub of the conspiracy. Not so—the booklet itself an Exhibit, could only be described as a form book. It specifically points out on page 5, that it contains suggested standards of fair and reasonable regulations which the cemetery would be advised to adopt but says that "* * * Jas. H. Matthews & Co. is not permitted to make recommendations and suggests that the reader consult his own attorney".
>
> The plaintiff has been required, under proper appropriate motions, to produce his case. He has said in depositions that he has no evidence other than that proffered. Clearly, the evidence fails to state a case under the Sherman Act.
>
> To put these parties to trial runs full face into the intent and purpose of Rule 56 of the Federal Rules of Civil Procedure. There not only is no genuine issue of material fact of conspiracy, there simply is no evidence of conspiracy at all and the plaintiff has said he could produce nothing more. [290 F. Supp. at 3-4]

CONCLUSION

For the reasons set forth herein, it is respectfully submitted that Norfolk's petition is without merit, that the District Court correctly found that there was no material issue of fact, and that the Court of Appeals for the Fourth Circuit properly affirmed the judgment of the District Court.

Respectfully submitted,



WILLIAM H. KING
ROBERT H. PATTERSON, JR.
J. ROBERT BRAME, III
Attorneys for Appellees, Jas. H. Matthews & Co. of Virginia and Jas. H. Matthews & Co.

McGUIRE, WOODS & BATTLE
1400 Ross Building
Richmond, Virginia 23219